

AMENDED IN ASSEMBLY JUNE 18, 2012

AMENDED IN SENATE MAY 22, 2012

AMENDED IN SENATE APRIL 9, 2012

SENATE BILL

No. 1516

Introduced by Senator Leno

February 24, 2012

An act to amend Section 3400 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1516, as amended, Leno. Public contracts: bids: "or equal" materials or service.

Existing law prohibits, except in specified circumstances, a state agency, political subdivision, municipal corporation, district, or public officer responsible for letting a public works contract from drafting bid specifications for that contract in a manner that limits the bidding to any one concern or product, unless the specification is followed by the words "or equal." Existing law requires that these bid specifications provide a period of time prior to or after, or prior to and after, the award of the contract to allow the contractor to submit data that demonstrates that a concern or product to be provided under the contract is equal to the concern or product identified in the bid specification.

~~This bill would additionally prohibit, except in specified circumstances, these bid specifications from requiring a bidder to provide submission of data substantiating a request for a substitution of "an equal" item prior to the bid or proposal submission deadline. The bill would exclude from this prohibition contracts with an agency of the state, a public officer of the state, or a person charged with the~~

~~letting of contracts for an agency of the state instead require these bid specifications to provide a period of time after the award of the contract for the submission of data substantiating a request for a substitution of “an equal” item, but would allow a solicitation for bids to require the submission of data substantiating a request for substitution of an equal item prior to the bid submission deadline only if the solicitation establishes a procedure for submission, evaluation, and determination, as provided. This bill would require the proponent of a proposed equal item submitted under that procedure to bear the burden of proof that the proposed item is equal to what is required by the bid specifications.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 3400 of the Public Contract Code is
2 amended to read:
3 3400. (a) The Legislature finds and declares that it is the intent
4 of this section to encourage contractors and manufacturers to
5 develop and implement new and ingenious materials, products,
6 and services that function as well, in all essential respects, as
7 materials, products, and services that are required by a contract,
8 but at a lower cost to taxpayers.
9 (b) (1) No agency of the state, nor any political subdivision,
10 municipal corporation, or district, nor any public officer or person
11 charged with the letting of contracts for the construction, alteration,
12 or repair of public works, shall draft or cause to be drafted
13 specifications for bids, in connection with the construction,
14 alteration, or repair of public works, ~~(1) (A)~~ in a manner that limits
15 the bidding, directly or indirectly, to any one specific concern, or
16 ~~(2) (B)~~ calling for a designated material, product, thing, or service
17 by specific brand or trade name unless the specification is followed
18 by the words “or equal” so that bidders may furnish any equal
19 material, product, thing, or service. In applying this section, the
20 specifying agency shall, if aware of an equal product manufactured
21 in this state, name that product in the specification. Specifications
22 shall provide a period of time ~~prior to or after, or prior to and after,~~
23 ~~after~~ the award of the contract for submission of data substantiating
24 a request for a substitution of “an equal” item. If no time period

1 is specified, data may be submitted any time within 35 days after
2 the award of the contract.

3 ~~(2) (A) Notwithstanding paragraph (1), specifications shall not~~
4 ~~require a bidder to provide submission of data substantiating a~~
5 ~~request for a substitution of “an equal” item prior to the bid or~~
6 ~~proposal submission deadline. Notwithstanding paragraph (1),~~
7 *the solicitation for bids may require submission of data*
8 *substantiating a request for substitution of an equal item prior to*
9 *the bid submission deadline, so long as the solicitation establishes*
10 *a procedure for (A) the submission of that information by any*
11 *potential contractor, subcontractor, supplier, or manufacturer of*
12 *any tier, (B) the evaluation of the submitted information, and (C)*
13 *the determination of acceptability, or not, at least 10 business days*
14 *before the bid submission deadline. Everything submitted under*
15 *the procedure, all products of the evaluation, and the determination*
16 *shall be confidential, proprietary information, and, to the extent*
17 *required to be produced under the California Public Records Act*
18 *(Chapter 3.5 (commencing with Section 6250) of Division 7 of*
19 *Title 1 of the Government Code), shall not be disclosed until the*
20 *contract is awarded.*

21 *(B) A proponent whose proposed equal item is not accepted*
22 *under a prebid submission procedure shall have standing to*
23 *challenge that decision in an action for declaratory relief, but that*
24 *action shall not affect the award of the contract.*

25 *(C) The proponent of a proposed equal item submitted under*
26 *the procedure described in subparagraph (A) bears the burden of*
27 *proof that the proposed item is equal to what is required by the*
28 *bid specifications. In any litigation over whether a proposed equal*
29 *item submitted under the procedure described in subparagraph*
30 *(A) is equal to what is required by the specifications, the prevailing*
31 *party shall recover reasonable attorney’s fees and expert costs.*

32 ~~(B) This paragraph shall not apply to contracts with an agency~~
33 ~~of the state, a public officer of the state, or a person charged with~~
34 ~~the letting of contracts for an agency of the state.~~

35 (c) Subdivision (b) is not applicable if the awarding authority,
36 or its designee, makes a finding that is described in the invitation
37 for bids or request for proposals that a particular material, product,
38 thing, or service is designated by specific brand or trade name for
39 any of the following purposes:

1 (1) In order that a field test or experiment may be made to
2 determine the product's suitability for future use.

3 (2) In order to match other products in use on a particular public
4 improvement either completed or in the course of completion.

5 (3) In order to obtain a necessary item that is only available
6 from one source.

7 (4) (A) In order to respond to an emergency declared by a local
8 agency, but only if the declaration is approved by a four-fifths vote
9 of the governing board of the local agency issuing the invitation
10 for bid or request for proposals.

11 (B) In order to respond to an emergency declared by the state,
12 a state agency, or political subdivision of the state, but only if the
13 facts setting forth the reasons for the finding of the emergency are
14 contained in the public records of the authority issuing the
15 invitation for bid or request for proposals.